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Nos. 94-977 and 94-6963

In the Supreme Court of the United States

OCTOBER TERM, 1994

BRENDA TUCKER, PETITIONER

v.

UNITED STATES OF AMERICA

BARBARA MCDONALD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

KATHLEEN A. FELTON
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

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QUESTION PRESENTED

Whether petitioners were entitled to dismissal of the indictment on the theory that a government agent's inducement of their crime constituted outrageous government conduct.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-23a)[1] is reported at 28 F.3d 1420.

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[1] Unless otherwise noted, "Pet. App." refers to the appendix to the petition in No. 94-977.

JURISDICTION

The judgment of the court of appeals was entered on July 15, 1994. A petition for rehearing was denied on August 26, 1994. Pet. App. 1b-2b. The petition for a writ of certiorari in No. 94-6963 was filed on November 21, 1994. The petition for a writ of certiorari in No. 94-977 was filed on November 23, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In a five-count indictment returned in the United States District Court for the Western District of Tennessee, petitioners were charged with purchasing, and aiding and abetting the purchase of, food stamps, in violation of 7 U.S.C. 2024(b)(1).[2] Petitioners moved to dismiss the indictment, claiming that the government's conduct in inducing them to commit their crimes violated due process. The district court, accepting the recommendation of a magistrate judge, granted the motion. The government appealed, and the court of appeals reversed and remanded for trial. Pet. App. 1a-23a.

1. Petitioners' indictment arose out of a "reverse sting" operation, in which an agent of the Department of Agriculture, Clifford White, retained Linda Hancock to offer to sell food stamps below face value. Agent White furnished Hancock food stamps and instructed her to sell them. Hancock was reimbursed for her mileage costs and was paid by being permitted to keep half the money collected from her sales of food stamps. Hancock was

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[2] Both petitioners were charged in Count One of the indictment. Counts Two, Three, and Four charged petitioner McDonald only, and Count Five charged petitioner Tucker alone. C.A. App. 17-21.

told to find people who were willing to buy food stamps below face value and to record her conversations with them. She was not told whom to approach, but she was instructed not to compel anyone to buy food stamps. Pet. App. 2a, 2c-3c.

Petitioner Tucker owned and operated a beauty salon in Memphis, and petitioner McDonald was her employee. Tucker and Linda Hancock were personal friends. Pet. App. 3c. In November 1990, Hancock contacted Tucker at the beauty salon and told her that she was in such dire financial need that her children would not have a proper Christmas. Hancock came to the beauty salon dressed in a manner that suggested she was in financial distress.[3] Hancock offered to sell Tucker food stamps at half their face value, and Tucker agreed. Tucker purchased food stamps from Hancock on two separate occasions; she also put Hancock in touch with McDonald and other salon employees and customers. *Id.* at 3c-4c; C.A. App. 128-129. Hancock told McDonald that Hancock had been sick and that she had to sell some food stamps in order to provide for her children's Christmas. Pet. App. 4c; C.A. App. 141. McDonald also purchased food stamps from Hancock. Pet. App. 4c.[4]

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[3] As the court of appeals noted (Pet. App. 4a n.1), the government vigorously disputed several of the magistrate judge's findings, described in the text, regarding practices employed by Hancock to ferret out persons willing to buy food stamps. For example, Hancock denied that she dressed in a manner suggesting she was in financial need and said she did not represent to petitioner Tucker that she was having financial difficulties. *Id.* at 3c-4c. The magistrate judge resolved the factual disputes based on credibility judgments, and the court of appeals found no clear error in those findings. *Id.* at 4a n.1.

[4] Hancock said she approached Tucker because she knew that Tucker had previously been convicted for shoplifting and thought

2. The magistrate judge recommended that the indictment be dismissed for outrageous government conduct. He noted that petitioners would not likely succeed with an entrapment defense because of their willingness to participate in the food stamps sales, but he thought the case was "one that should be dismissed without regard to [petitioners'] ability to mount an entrapment defense," because the government's conduct went so "far beyond the bounds of propriety" as to constitute a violation of due process. Pet. App. 7c-8c.

The district court accepted the magistrate judge's recommendation and dismissed the indictment. The court agreed that the facts made it doubtful that either defendant would be able to present a credible entrapment defense, but it concluded, as had the magistrate, that the totality of the facts in this case crossed the boundary of due process. Pet. App. 1e-4e. The court remarked (*id.* at 3e):

> I don't think we are at a point in our criminal history where the government needs to lower itself into targeting sympathetic ploys on citizens that are not otherwise suspected of engaging in criminal conduct * * *.

3. On the government's appeal, the court of appeals reversed and remanded for trial. The court of appeals concluded that, as a matter of law, a defendant could not claim a violation of due process based solely on the

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that she had also been involved in stolen credit cards and fur coats; the magistrate, however, noted that the shoplifting conviction occurred 16 years before and that Tucker's denial of any involvement in stolen credit cards or merchandise was credible. There was no evidence that either Tucker or McDonald had ever previously been involved in food stamps sales. Pet. App. 5c-6c; C.A. App. 97-102.

theory that his criminal behavior was induced by the government and that the government's conduct was objectively outrageous. Rather, when a defendant attacks the manner in which the government induced him to commit a crime, he is "limited to the defense of entrapment and its key element of predisposition." Pet. App. 20a-21a.

The court of appeals began by noting that this Court had never accepted the so-called "objective" entrapment defense, which would focus solely on the government's conduct and would not consider whether the defendant was subjectively predisposed to commit the offense. Although this Court stated in *United States* v. *Russell*, 411 U.S. 423, 431-432 (1973), that outrageous government conduct might be a bar to prosecution in a sufficiently extreme and shocking case, the court noted that that suggestion was made in dicta. The court of appeals further observed that the plurality in *Hampton* v. *United States*, 425 U.S. 484 (1976), had repudiated any defense based on outrageous conduct, and while Justice Powell's concurring opinion in *Hampton* continued to leave open the possibility of such a defense, his opinion for the Court in *United States* v. *Payner*, 447 U.S. 727 (1980), appeared to abandon that possibility. Pet. App. 7a-9a & n.3.

The court of appeals then stated that many of its prior cases had assumed the existence of a due process defense based on outrageous government conduct. None of those cases, however, had reversed a conviction based on that defense. Similarly, the court of appeals noted, other courts of appeals had often cited *Russell* for the possibility that a prosecution could be barred based on outrageous conduct, but had rejected the defense on the facts of each case. The court of appeals found only one case in which a court had actually barred a prosecution

on that basis, *United States* v. *Twigg*, 588 F.2d 373 (3d Cir. 1978), but it observed that *Twigg* had been disavowed by the court that had decided it. Pet. App. 11a-12a.

Finding no authority requiring it to recognize the due process defense of outrageous government conduct, the court of appeals articulated three reasons for concluding that such a defense should not be recognized. First, the court reasoned, government conduct that induces a defendant to commit a crime, even if considered "outrageous," does not violate a defendant's due process rights, because the basis for the defense of entrapment has been held to lie in congressional intent, not in the Due Process Clause. The court explained that if Congress could eliminate the entrapment defense even for defendants who were not predisposed to commit a crime, the Constitution does not require an outrageous-conduct defense for defendants who were predisposed to commit a crime. Pet. App. 16a-17a.

Second, the court of appeals found no authority to dismiss an indictment in the absence of any specific violation of a defendant's due process rights. The court noted that this Court's decision in *United States* v. *Payner*, 447 U.S. 727, 737 n.9 (1980), had rejected a similar attempt to dismiss an indictment based solely on an " 'objective' assessment of the government's conduct." Pet. App. 17a-18a.

Finally, the court of appeals stated that recognition of an outrageous conduct defense would violate separation of powers principles. The court noted that the Executive Branch is principally responsible for regulating the conduct of investigations, and that, through the entrapment defense, Congress "has implicitly curbed the Executive Branch" from engaging in conduct that induces a defendant to commit a crime that he is not predisposed to commit. Pet. App. 19a. The court of

appeals concluded that the Judiciary should not inject itself further into the role of reviewing police practices by invoking the Due Process Clause. Rather, the jury, acting as factfinder in cases of alleged entrapment, "operates as the ultimate check on abuses of executive power." *Id.* at 18a-20a.

The court of appeals therefore held that "a defendant whose defense sounds in inducement is, by congressional intent and Supreme Court precedent, limited to the defense of entrapment and its key element of predisposition." Pet. App. 20a. The limitations on that defense, the court determined, cannot be circumvented by an outrageous conduct defense under the Due Process Clause.[5] *Ibid.*

Judge Martin concurred in the result. In his view, the court was bound by prior Sixth Circuit precedent to recognize the existence of an outrageous government conduct defense. He concurred, however, because he did not believe that the government's conduct in this case, measured by the factors set forth in *United States* v. *Barger*, 931 F.2d 359, 363-364 (6th Cir. 1991), was outrageous. Pet. App. 21a-23a.

ARGUMENT

Petitioners contend (94-977 Pet. 11-29; 94-6963 Pet. 12-26) that the court of appeals erred in rejecting an outrageous government conduct defense based on the conduct of government agents in inducing the defendant to commit a crime. They argue that the decision below conflicts with decisions from the Third and Ninth Circuits in which those courts dismissed indictments for outrageous government conduct, and with the analysis of

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[5] The court remanded for a trial, at which the issue of entrapment would be determined by the jury. Pet. App. 21a.

cases in other circuits. Petitioners' claim does not merit this Court's review. Although the courts of appeals have expressed different views on whether any outrageous government conduct defense exists, the facts of this case would not fall within the extremely narrow category of cases in which the courts have said such a defense might be appropriate.

1. This Court has never held that the government's employment of undercover agents, or the use of deception by them, gives rise to a due process defense. While the Court has permitted defendants to raise an entrapment defense, under which a defendant who lacks the predisposition to engage in criminal conduct may avoid conviction when the government has induced him to commit the crime, see *Jacobson* v. *United States*, 112 S. Ct. 1535, 1540 (1992), the Court has repeatedly tied that defense to the defendant's lack of subjective predisposition to violate the law. The Court has rejected the so-called "objective" theory of that defense, which would focus only on the government's conduct. *United States* v. *Russell*, 411 U.S. 423, 433-434 (1973); *Sherman* v. *United States*, 356 U.S. 369, 376-377 (1958); *Sorrells* v. *United States*, 287 U.S. 435, 451 (1932). As the Court put it in *Russell*, "the defense of entrapment enunciated in [*Sorrells* and *Sherman*] was not intended to give the federal judiciary a 'chancellor's foot' veto over law enforcement practices of which it did not approve." 411 U.S. at 435.

In *Russell*, the Court left open the possibility that conduct of law enforcement officials may be "so outrageous that due process principles would absolutely bar the government from invoking judicial process to obtain a conviction." *Russell*, 411 U.S. at 431-432. The *Russell* Court's citation (*id.* at 432) to the "stomach pumping" case, *Rochin* v. *California*, 342 U.S. 165 (1952), however,

implied a due process concern with conduct involving police violence or brutality. The Court's subsequent decisions indicate that, if any outrageous government conduct defense exists as to investigatory tactics, it is exceedingly narrow in scope. See *Hampton* v. *United States*, 425 U.S. 484 (1976); *United States* v. *Payner*, 447 U.S. 727, 737 n.9 (1980).

Indeed, in *Hampton*, the plurality would have rejected any due process defense when a defendant is predisposed to engage in the crime. 425 U.S. at 488-491 (plurality opinion). Justice Powell, joined by Justice Blackmun, concurred in the judgment and did not wish to foreclose all possibility of a due process defense, but underscored that "the cases, if any, in which proof of predisposition is not dispositive will be rare," and that claims of "outrageousness" would be particularly unlikely to succeed when the challenged police practice involves the use of undercover agents to combat contraband offenses. *Id.* at 495-496 & n.7. And in *Payner*, the Court cast further doubt on a due process defense based on purportedly outrageous conduct. 447 U.S. at 737 n.9. In light of the reasoning of those cases, there is significant support for the court of appeals' conclusion that a defense of outrageous conduct cannot be predicated solely on the way in which a defendant was induced to commit a crime in an undercover investigation.

2. Petitioners contend that the court of appeals' rejection of an outrageous conduct defense conflicts with the decisions of other courts of appeals. 94-977 Pet. 13-22; 94-6963 Pet. 17-21. It is true that the court in this case went further than other courts of appeals in precluding an outrageous government conduct defense that relies solely on an objective attack on the government's inducement of a crime. But the court's holding, on the facts of this case, is consistent with the

results reached by other courts of appeals. Although other courts have recognized an outrageous conduct defense in theory, no court of appeals has held that a predisposed defendant may establish a violation of due process merely because he was induced to commit the crime by an undercover agent. Rather, courts have generally reserved an outrageous conduct defense for cases involving far more egregious conduct. See *United States* v. *Kelly*, 707 F.2d 1460, 1461, 1476 (D.C. Cir.) (opinion of R.B. Ginsburg, J., for the court) (suggesting that coercion, violence, or brutality is required), cert. denied, 464 U.S. 908 (1983); *United States* v. *Myers*, 692 F.2d 823, 836-843 (2d Cir. 1982) (same), cert. denied, 461 U.S. 961 (1983). And, contrary to petitioners' contention, the decision below does not conflict with the result reached by any other court of appeals.

In *United States* v. *Twigg*, 588 F.2d 373 (1978), a divided panel of the Third Circuit reversed convictions where government agents had supplied the defendants—who had previously been "lawfully and peacefully minding [their] own affairs," *id.* at 381; see also *id.* at 382—with the chemicals, laboratory, and expertise necessary for them to manufacture methamphetamine. As the Third Circuit recently noted, however, it has never applied *Twigg* since that case was decided, see *United States* v. *DeRewal*, 10 F.3d 100, 105 n. 3 (1993), cert. denied, 114 S. Ct. 1544 (1994), and that court also has suggested that *Twigg* was wrongly decided. See *United States* v. *Beverly*, 723 F.2d 11, 12 (1983). Moreover, even were *Twigg* still authoritative, it is distinguishable. Unlike the government agents in *Twigg*, Hancock merely presented petitioners with an opportunity to buy food stamps and allegedly used deceptive tactics in her offer of sales; petitioners showed a ready willingness to make the illegal purchases, and there was no need for Hancock

to provide extraordinary means for committing the crimes.[6]

Nor are petitioners aided by *United States* v. *Solorio*, 37 F.3d 454 (1994), withdrawn, 43 F.3d 1334 (9th Cir. 1995) (see Pet. App. 1f-25f). That case turned on the panel's perception (which the government has disputed in a rehearing petition that remains pending) that a drug informant "was paid a fee contingent on conviction." 37 F.3d at 458; see also *id.* at 459, 460 (reemphasizing that payments were contingent on "getting people convicted"). The panel deemed such a contingency fee outrageous because it provides "too great an incentive for informants to fabricate evidence and to maximize the amount of drugs involved." *Id.* at 458. In this case, however, Hancock, the undercover agent, was paid by being permitted to keep half the proceeds of her food stamps sales. There was no evidence that her payments were contingent on obtaining convictions, and petitioners' claim was not predicated on the theory that the payment arrangements rendered the agent's testimony unreliable. In any event, the panel that decided *Solorio* has ordered the publication of its opinion withheld pending further order of the court, and the government's petition for rehearing, and suggestion for rehearing en

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[6] Petitioner Tucker also puts some reliance (94-977 Pet. 24-25) on *United States* v. *Lard*, 734 F.2d 1290 (8th Cir. 1984), but in that case the court of appeals reversed on traditional entrapment grounds, finding that the facts failed to show that the defendant was predisposed to commit the crime. The court went on to remark that the conduct of government agents in that case "approached" the kind of outrageous government conduct that had led the court in *Twigg* to reverse on due process grounds. *Id.* at 1296-1297. The court's due process comments were unnecessary to its decision, since it had already found entrapment as a matter of law.

banc, remains pending. Thus, the decision in *Solorio* may yet be modified or reconsidered by the court of appeals en banc.[7]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

KATHLEEN A. FELTON
Attorney

MARCH 1995

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[7] Petitioner McDonald also complains (94-6963 Pet. 27-31) that the court of appeals erred in holding that it was not bound by its prior cases assuming the existence of an outrageous government conduct defense on the ground that the comments in each of those cases were dicta. Pet. App. 11a. That contention does not merit review by this Court. Whatever conflict may exist among Sixth Circuit precedents is a matter for resolution by the court of appeals. *Wisniewski* v. *United States*, 353 U.S. 901 (1957).